CSS Healthcare Services, Inc. *and* Victoria Torley.
Case 10–CA–37628

January 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 29, 2009, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CSS Healthcare Services, Inc., Jonesboro, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 29, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

---

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, ___F.3d___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Victoria Torley, Member Schaumber agrees that the Respondent's contention—that Torley was terminated for failing to timely apply for funding for a substance abuse program for older adults—is pretextual. However, Member Schaumber notes that the testimony of Georgia state auditors Camille Richins and Troy McQueen does not demonstrate pretext as to that contention, as neither of them testified about that specific funding application. Instead, Member Schaumber finds that pretext is demonstrated by the Respondent's shifting reasons for the discharge. Thus, although Agulue testified that he terminated Torley because she "failed to deliver" on her promises to secure program funding, he also claimed that he did not meet with Torley with the intention of discharging her, but decided to discharge her because she "caused a commotion" during their meeting.

Chairman Liebman agrees with the judge's rationale, but also concurs that a violation may properly be found based on Member Schaumber's view of the evidence.

[3] We shall modify the judge's recommended Order to include the standard remedial language for the violation found, and we shall substitute a new notice to employees to conform to the language in the Order.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Victoria Torley full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Victoria Torley whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order remove from our files any reference to Victoria Torley's unlawful discharge, and WE WILL, within 3 days thereafter, notify her in writing that we have done so and that we will not use the discharge against her in any way.

CSS HEALTHCARE SERVICES, INC.

Jeffrey D. Williams, Esq., for the General Counsel.
Ernest C. Egoh, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Atlanta, Georgia, on March 9 and 10, 2009. Victoria Torley, an individual, filed the unfair labor practice charge on November 26, 2008.[1] Based upon this charge, the complaint issued January 13, 2009. The complaint alleges that CSS Healthcare Services, Inc., the Respondent, violated Section 8(a)(1) of the Act by discharging Torley on September 8 because the Respondent believed she was engaged in protected concerted activities, and to discourage other employees from engaging in such activities. On January 26, 2009, the Respondent filed its answer to the complaint, denying that it committed the alleged unfair labor practices and asserting that the Charging Party was never an employee of the Respondent, having been hired by another company, GCCS, Inc., as an independent contractor to work on a specific project. The Respondent also denied any knowledge that the Charging Party, or any of its employees, had engaged in protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides in-home health services for the young, the elderly and the mentally impaired from its facility in Jonesboro, Georgia. The Respondent annually derives gross revenues in excess of $1,000,000 from its operations, at least $500,000 of which is in the form of Medicaid payments. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

B .The Evidence

There is no dispute that Torley was hired, by John Agulue, in late October or early November, 2007 to work for an entity known as Georgia Community Care Solutions, Inc., or GCCS. Agulue is the CEO of both GCCS and the Respondent. It is also undisputed that Agulue terminated Torley on September 8. The parties disagree about practically everything that happened from the time Torley was hired until she was terminated, including whom she was working for at the time of her termination and whether she was ever an employee of the Respondent. General Counsel relied almost exclusively on Torley's testimony to establish the unfair labor practices, while the Respondent relied almost exclusively on the testimony of Agulue to prove its defense. The resolution of this case turns in large part on who was the better witness.

Torley testified that she applied for a job with GCCS in response to an advertisement. She was interviewed by Agulue. The job involved coordinating the start up of GCCS to be a provider of services for the State of Georgia under a program called "Intensive Family Intervention", or IFI, which was funded in part by Medicaid. Torley and another woman, Dollmeishia Adams, were hired around the same time. They were charged with drafting and submitting the application to the State to become part of the IFI program. Once they started working on the application, they learned the Respondent would also have to apply to be a provider under the State's Adult Core program in order to become an IFI provider. Torley and Adams also worked on an application for a third program, known by its acronym, CCFA. In addition, there is no dispute that Agulue also directed Adams and Torley to research any other sources of revenue and apply for any grants, or programs, state or federal, that would be consistent with GCCI's involvement in the IFI program. Torley and Adams were GCCI's only employees. They reported directly to Agulue. They worked out of an office in a suite across the parking lot from the Respondent's main office.[2]

Agulue disputed Torley's testimony regarding the circumstances of her hiring, claiming she walked in off the street, offering her services. According to Agulue, Torley was persistent in contacting him and pushing to start working for GCCI, claiming that she had experience with IFI and the qualifications to get the program up and running in no time. He testified that Adams approached him around the same time seeking work and he decided to hire both women to work on obtaining grants and other funding to get GCCI going.[3] He claimed ignorance regarding IFI or any of the other programs Torley and Adams applied for, testifying that he left it to their expertise to know what needed to be done, with very little input from him.

Both Torley and Adams were paid on an hourly basis only

[1] All dates are in 2008 unless otherwise indicated.

[2] At some point in 2008, the Respondent moved some of its staff into the suite occupied by Adams and Torley.

[3] Adams testified that she knew Agulue previously because she had worked with his wife, Rose Agulue.

for the hours they worked for GCCS. Torley and Adams were required to sign in and out to document the hours each worked for GCCS. Because GCCS had no funds when they started, they were initially paid with checks from the Respondent. Once GCCS obtained $20,000.00 from a loan from the Respondent, Adams and Torley were paid with checks drawn on the GCCS bank account. There is no dispute that no taxes or other deductions were made from the payments to Torley and Adams. Torley acknowledged that she received a Form 1099, rather than a W-2, showing her earnings from GCCS for tax purposes. Torley and Adams received no benefits, such as sick leave, holiday pay, or insurance, from GCCS or the Respondent during the time they worked for GCCS.[4]

Torley and Adams worked in an office provided by the Respondent and used computers, papers, pencils and office supplies provided by GCCS or the Respondent without being required to reimburse either entity. They occasionally used the services of the Respondent's administrative staff, again without charge. If Torley or Adams used their own vehicle to attend a meeting for GCCS, they were reimbursed for the mileage, just as the Respondent's employees were. On one occasion, Torley used a company vehicle to attend to GCCS business without being required to reimburse either GCCS or the Respondent for its use.

Torley and Adams submitted weekly "Activity Reports" to Agulue, documenting what they had done each week to get GCCS going. Torley testified that they would consult with Agulue regarding their research into other funding sources and seek his approval before applying for any grants beyond those initially assigned. Torley testified that they also submitted any completed applications to Agulue for review before filing them with the appropriate government agency. Once the applications were filed, Torley or Adams were responsible for following up on any inquiries from the governmental agency and supplying any additional information that might be requested. There is no dispute that, once GCCS was awarded funding for IFI or any other program, it was understood that Torley and Adams would run the program, interviewing and hiring staff if necessary. Significantly, during the time that Torley worked for GCCS, she was paid for the time she worked regardless of her success in securing revenue for GCCS. In other words, rather than being paid a fee based on the success of her efforts, she was paid, hourly, for the work she performed. She thus bore none of the risk inherent in an entrepreneurial enterprise.[5]

Torley testified that, by April, all the applications she and Adams had been working on were filed and they were just awaiting a response. Adams stopped working for GCCS in about mid-March, when she found another job. According to Torley, Agulue told her in April to go home and that he would call her if he had any work.[6] Torley testified that, after about a 2-week hiatus, Agulue called Torley and asked her to come back to work as a behavior specialist with the Respondent. Torley testified further that Agulue told her that the former behavior specialist, Dr. Jackson, was no longer employed and he needed someone to review and draft behavior support plans for the Respondent's clients. Torley testified that, for about 1 month, she worked part-time as a behavior specialist, until Agulue asked her to work on two other projects. One was to review the Respondent's policies and procedures as part of an application seeking accreditation from a national accrediting body acceptable to Medicaid. The other project was to review files and procedures to prepare for a state audit of the Respondent's programs in July. Because of these additional duties, Torley began working full-time. She was assigned to the Respondent's Mentally Retarded Waiver Program (MRWP), under Nikita Davis, who had recently been hired as program manager.

Torley continued to be paid an hourly rate only for the hours she worked, as documented initially by a sign-in/sign-out sheet and later, when implemented, by punching in and out on a new timekeeping system. This was the same procedure used by the Respondent's employees to keep track of their time. Torley continued to be paid on Friday, the same as the Respondent's employees, but still without any withholdings or deductions from her pay. She received no benefits. Torley never officially resigned from GCCS, nor did she file an application or other paperwork to start her employment with the Respondent. She did begin receiving her paychecks from the Respondent after she returned to work.[7] From then until she was terminated, Torley was paid by the Respondent on its payroll account.[8]

Agulue disputed Torley's testimony regarding the circumstances surrounding her "employment" by the Respondent after April. According to Agulue, after all the GCCS applications had been filed and after Adams had gone, Torley approached him, asking if he had any work for her to do because she needed the money. Agulue testified that he gave her some behavior plans to review because she said she wanted to do this. Agulue claims he let Torley review the behavior plans, even though he already had a behavior specialist, Dr. Jackson, who worked part time as needed, and even though he did not feel that Torley was qualified to do this work. He admitted giving her the other work she identified, i.e., working on the accreditation and preparing for the State audit, but claims he did this only because she was persistent in demanding more work. According to Agulue, he paid her out of the Respondent's funds because GCCS had run out of money to pay her. Agulue claims that, at no time, did Torley become an "employee" of the Re-

[4] Although the Respondent's employees received holidays, sick leave, and vacation benefits, the Respondent did not provide health insurance benefits to anyone. The testimony indicates that the Respondent was looking into providing this benefit in September, around the time that Torley was terminated.

[5] Adams was called as a witness by the Respondent. Her testimony regarding the terms of her employment with GCCS was consistent with that of Torley.

[6] The documents in evidence show that the last check Torley received from GCCS is dated April 18, for the period April 7 through 11.

[7] The first paycheck from the Respondent to Torley that is in evidence is dated July 11, for the period June 30 through July 7. The Respondent acknowledged at the hearing that its records were not complete. There is other evidence in the record that Torley was working for the Respondent before June 30, even if there is no payroll record of this.

[8] The 1099 issued to Torley for 2008 lists GCCS as her employer, even though it is clear she was paid by both GCCS and the Respondent during the year.

spondent.

Torley testified that, after she started working for the Respondent, she began attending weekly staff meetings chaired by Agulue, as well as MRWP program staff meetings led by Nikita Davis. No one ever told Torley that she did not need to attend these meetings, or that they did not concern her. In fact, the minutes of the June 23 staff meeting, prepared by the Respondent's administrative assistant and signed by Agulue, show that Agulue introduced Torley at that time as a new employee who "will create behavioral plans."

Torley testified that, at several of the MRWP program staff meetings she attended, employees voiced concerns about their working conditions, including the low rate of mileage reimbursement for using a personal vehicle and the lack of health insurance. She recalled one meeting in particular, in late June, when employees were particularly upset because of an announcement that had recently been posted that the Respondent would begin requiring a doctor's note for absences of even one day. Torley testified that the employees asked Davis to raise their concerns with Agulue and come up with policies that met "industry standards." She recalled that employees had specific proposals, such as an increase in the mileage reimbursement rate to $.50 and a change in vacation to an accrual policy. According to Torley, Davis came back at the next meeting, in July, and told the employees she had discussed their proposals with Agulue and he liked them. Although Torley recalled Davis saying that Agulue planned to implement these policies, no changes were made before Torley's termination. Torley testified that, when asked, Davis claimed that Agulue was preoccupied with the state audit and did not have time to implement the proposals. Agulue testified that he was unaware of any group concerns from his employees. He acknowledged, however, that Davis would on occasion bring employees' concerns to him and he would try to address them. He denied any knowledge that Torley was involved in any concerted complaints. Counsel for the General Counsel called no other employees to corroborate this testimony. Neither party called Nikita Davis as a witness.[9]

The State audit team visited the Respondent's facility on July 21 to review its programs and files. On August 18, Agulue and several of the Respondent's managers attended an exit meeting at the State's offices to review the audit. Torley attended this meeting. It is undisputed that the State's auditors noted a number of deficiencies in the Respondent's programs, including issues regarding the behavior support program that Torley had worked on. The Respondent was told that it could not admit any new clients until the deficiencies were cleared. Torley testified that the State's audit committee questioned her qualifications to be a behavior specialist. After this meeting, she returned to the office and compiled the documents needed to establish her credentials and faxed them to the State. Torley's testimony that the State auditors were satisfied with her qualifications is corroborated by Jeanne Manko, the State's team leader for the audit, who was called as a rebuttal witness by the General Counsel. Manko also confirmed, with testimony and documents, that Agulue had identified Torley as the Respondent's Behavior Specialist during the audit, contradicting Agulue's testimony.

After the August 18 meeting, Torley continued working on the audit, correcting the deficiencies noted in the behavior support program. At the same time, she continued to pursue claims raised by employees at the staff meetings. According to Torley, during her research, she discovered that the employees could form a "collective bargaining unit" that would have more leverage to negotiate with the Respondent and that would protect the employees from retaliation. Torley claimed that she also learned that, under the law, the Respondent had to provide each employee with a copy of the Employee Handbook when hired. Torley testified that she had never seen an employee handbook in the time she worked at the Respondent's facility. Torley testified that she shared this information with other employees at an informal meeting on August 29. Later that day, Torley and about 10 employees met with Agulue and his wife, Rose Agulue, who was employed as head of the nursing department. Davis was also present. Torley testified that Davis presented the employees' proposals that are described above. According to Torley, Agulue responded by stating that they were not considered employees until after working for the Respondent 90 days. Instead, he told them they were independent contractors for the first 90 working days. Torley testified that this created a storm among the employees and that she herself asked Agulue if she was an employee or independent contractor. Agulue responded that Torley was "a special case". She persisted in questioning him regarding her status and he continued to evade answering until his wife, Rose, said: "You're an employee." Other than denying knowledge of any employee complaints, Agulue did not contradict Torley's testimony regarding this meeting. Rose Agulue did not testify in this proceeding. Nor were any of the other employees at this meeting called as witnesses.

Torley testified that, after this meeting, she researched the issue of employee vs. independent contractor status and determined that the Respondent's employees were not independent contractors. She shared this information with other employees on September 2, after a weekly staff meeting. According to Torley, at the staff meeting, Davis had asked Mr. and Mrs. Agulue for a copy of the employee handbook and Agulue replied that it was in the process of being revised. Again, while not specifically contradicted by Agulue, Torley's testimony is uncorroborated.

On September 3, according to Torley, she met alone with Agulue in his office, before lunch. In this meeting, Torley "invoked whistleblower status" and informed him that the employees were a "collective bargaining unit" and, as such, any action he took against any one of them would have consequences. After first claiming not to know what a whistleblower was, Agulue changed the subject and began questioning Torley's status as behavior specialist. He told her that the Respondent did not need a full-time behavior specialist. Torley replied that she did not work full-time as a behavior specialist but also worked on other projects he assigned her. Agulue told Torley that, when the Respondent needed a behavior specialist, it

[9] Although at one point in the hearing General Counsel claimed that Davis was a supervisor, this is not alleged in the complaint. The evidence is insufficient to make any determination as to her supervisory status.

brought in someone from outside and, when done, let them go. Torley ended the meeting by telling Agulue that, if he took action against anyone in the collective-bargaining unit, she would file a complaint.Agulue did not specifically contradict Torley's testimony regarding this meeting.

After the meeting, because of the questions Agulue had raised about her position, Torley sent him an e-mail, reminding him that, in response to concerns raised by the State auditors, she had printed out and signed a job description for the behavior specialist position to be placed in the files. She ended the e-mail by stating: "I think that that effectively answers the question of what my job is." Although Torley testified that she received no response to this e-mail, Agulue testifies that he did respond, in writing, as follows:

> I do not have vacancy for behavior specialist at this time. Please what is going on with the IFI Program that you are working on? You were specifically engaged to establish the IFI Program for GCCS and we have borrowed money to keep you working on the program. You told me that we are close to being certified for the Program as well as the Medicaid part, so what is going to happen to the program. As I have told you before, Dr. Valerie Jackson is still our Behavior Specialist and we use her services as needed.
>
> I don't think that what you are proposing is what I need at this time. You will submit an application if you need to be hired for a position outside of the IFI project. Please do not continue to distribute papers naming yourself CSS Behavior Specialist.

Agulue's testimony regarding how he gave this memo to Torley is inconsistent. At first, he claimed to have hand-delivered it to her in her office. Later, on cross-examination, Agulue testified that he left it in an in-box on her desk. Finally, after being confronted with his pretrial affidavit, he admitted having stated there that he slid the memo through a mail slot in her office door. In light of these inconsistencies, I can not credit Agulue's testimony that he provided this response to Torley.

Torley testified that, on the same day she met with Agulue and sent him the e-mail to respond to his questions about her position, Mrs. Agulue came to her office, at about 4:45 pm. Nikita Davis was already in Torley's office because she and Torley were working on the Respondent's response to the State audit in preparation for another visit by the State team scheduled for September 4. Mrs. Agulue asked Torley why she was trying to create trouble in the agency. She told Torley that the Respondent had been good to her, bringing her back to work in May when Torley wasn't working. Torley replied that it wasn't about her, it was about the MRWP staff. According to Torley, she and Mrs. Agulue went "round and around" on issues of her status as behavior specialist, the employee handbook and employee vs. independent contractor status, without any agreement. At about 5:15 pm, Torley got up to leave, telling Mrs. Agulue that they weren't getting anywhere with this conversation. According to Torley, Mrs. Agulue stood in front of the door with her hand on the doorknob, effectively blocking her exit, while continuing to discuss the same issues. Mrs. Agulue finally stepped aside when Davis said she had to leave to pick up her children. Neither Davis nor Mrs. Agulue testified in this proceeding, leaving Torley's testimony uncontradicted.

The next day, September 4, the State audit team revisited the facility to review what steps the Respondent had taken to clear the deficiencies noted on August 18. According to Torley, when the team asked to meet with the Respondent's behavior specialist, Agulue brought her in. Torley testified that the audit team was satisfied with the work she had done to clear the deficiencies in the behavior support program, giving her an "A+". Although Agulue admitted that the State team noted improvements in the behavior support program, he disputed Torley's testimony that she got the credit for it. Agulue claimed that a team of employees, including Torley, worked on correcting the problems noted with that program. He attempted to minimize her role in this effort, at first claiming that she merely typed the corrections and that the others made the substantive improvements. On repeated questioning on cross-examination, Agulue reluctantly conceded that Torley might have made some substantive changes to correct the deficiencies. He insisted however that she was not qualified to be the Respondent's behavior specialist. Manko, the State audit team leader, testifying on rebuttal, supported Torley's testimony and contradicted Agulue.

On September 5, Agulue sent Torley a memo asking for an update on the IFI program. In the memo, Agulue stated:

> You have worked the IFI Program independently for a considerable length of time now beginning October 27, 2007. In order for me to evaluate the program, kindly provide me a report on the status of the IFI project including:
>
> Applications made & To whom
> Contact Persons
> Work completed
> Contracts secured if any.
> Where we are at this time?

Agulue asked for Torley's response by the end of the day. Torley responded the same day as follows:

> **IFI and Adult Core**
>
> On July 18, 2008, we received a deficiencies letter regarding our IFI application. I replied to the letter, and, on July 23, we received the attached indicating we should ignore # 11.
>
> On August 28, 2008, I hand delivered the financial documents requested on page 4 to Mr. McQueen. At that time, he explained that we did not need to have a copy of our insurance policy (which is in process) as he had received a copy of our application.
>
> Current Status of IFI and Adult Core
>
> All areas adequately addressed. Waiting for state approval.
>
> **CCFA**
>
> Our application is complete and has been submitted twice. Ms. Cofield at the state office has indicated that they will begin processing new applications "sometime" after October 1, 2008.

The copy of this memo in evidence does not contain an attachment.

McQueen, the State employee who was reviewing GCCI's IFI and Adult Core applications, confirmed that the application had been submitted and that two updates had been sent to Dollmeishia Adams, who was listed on the application as the contact person. The last update is the July 18 correspondence referred to by Torley in her memo to Agulue. McQueen testified that it is not uncommon for the State to seek additional information after an application is received. According to McQueen, it could take anywhere from 3 months to a year to review such an application. GCCI's IFI application had been submitted on January 9.

The following Monday, September 8, Torley attended the weekly staff meeting of the Respondent's employees. During this meeting, the subject of a longer lunch break was raised. At that time, the Respondent's employees, and Torley, worked from 8:30 am to 5 pm with 30 minutes for lunch. Some employees had asked for a longer lunch. Agulue proposed at this meeting that the lunch break be extended to an hour with the start time moved up to 8:00 am, or the end of the day moved out to 5:30 pm. At first, no one said anything. Finally, Torley spoke up and said that some people have concerns with child care and a change in the work hours might be a hardship. Agulue asked Torley if she was speaking for herself. Torley replied, "no." Agulue then told Torley that, if she didn't have anything to say for herself, then she shouldn't be talking. At that point, according to Torley, other employees with child care concerns spoke up and, ultimately, the employees chose to remain on the current schedule with a 30-minute lunch. Agulue also testified about this meeting and corroborated Torley's testimony regarding what she said and his response. According to Agulue, he was merely taking a vote on the proposal to change the schedule and was asking Torley to vote only for herself, i.e., whether she wanted the change or not.

Torley testified that, later that day, at 4 p.m., Agulue came to her office and again told her he did not need a full-time behavior specialist. Torley again reminded Agulue that she did not work "full-time" as a behavior specialist. After going round and around again on this issue, Torley came to believe that Agulue was about to fire her. At that point, she left and asked another employee to come into her office to witness the conversation. When the employee saw Agulue in her office, she asked what this was about and Torley told her that she thought Agulue was trying to fire her. The other employee turned around and walked out of the office, saying she did not want to be part of it. At that point, according to Torley, Agulue told her she was fired and asked her to pack up her things and leave. On cross-examination, when asked what precisely Agulue said when he fired her, Torley replied that she didn't remember precisely what he said, but that it was things he had said before indicating that her work was not satisfactory. Torley testified that when she asked for specifics, Agulue was unable to give her any.

Agulue testified regarding this meeting in Torley's office on September 8. According to Agulue, he did not go to her office with the intention of firing her but, rather, to ask her about a letter he had received from the U. S. Department of Health and Human Services (HHS). The letter, which is undated and addressed to Torley, stated that an application that GCCS had filed for funding for a program for substance abuse services for older adults, had been rejected as untimely. Agulue wanted to know why she was telling him that everything was on course to get GCCS up and running and here she had missed the deadline to file a grant application. He expressed concern that she was not delivering on the promises she made when he hired her to get funds for GCCS. Agulue testified that, when he started questioning Torley about the letter, she became "hysterical", saying, "Do you want to fire me" and on and on. He corroborates Torley's unsuccessful effort to have another employee witness the meeting. At that point, Agulue decided to terminate her because she was "creating a commotion." According to Agulue, he told her he was terminating her because she failed to produce results after spending all of GCCS money.

Torley acknowledged being aware of the letter the Respondent had received from DHHS. According to Torley, this letter had been received some time before September 8 and Agulue had discussed it with her before the meeting on September 8.[10] She denied that he mentioned this letter when he fired her. As for the program referred to in the letter, Torley testified that it was unrelated to the IFI and Adult Core program that were to be the centerpiece of GCCS operations. This was a grant she and Adams had come across in researching other sources of funding that might complement GCCS IFI program. Torley testified that Adams may have done more of the work on this application although she admittedly was the one who filed it. Adams, when she testified for the Respondent, could not recall much about this application but did acknowledge, when shown copies of Activity Reports submitted when she worked for GCCS, that she in fact attended several meetings to obtain information to complete the application for this program.

Agulue testified that he terminated Torley on September 8 because she "failed to deliver" on her promises regarding the IFI program and GCCS. Although there was much testimony about Torley's work on the behavior plans and whether Agulue had hired her to be the Respondent's behavior specialist, he admitted that this had nothing to do with her termination. Similarly, although he attempted to diminish and denigrate her work on the State audit, he also conceded, ultimately, that this had nothing to do with her termination. From his testimony, it appears that Agulue held Torley responsible for the failure of any of the program's planned for GCCS to materialize. However, the testimony of McQueen, the State employee reviewing GCCS applications negated Agulue's testimony. According to McQueen, the reason no action had been taken on GCCS applications was because the State had placed a hold on the application due to the deficiencies noted on the audit of the Respondent's programs. Until those deficiencies were cleared, neither the Respondent nor any other entity related to it, could get State money to serve new clients. McQueen's testimony was confirmed by his boss, Camille Richins, Director of Provider Enrollment for the Georgia Department of Mental Health, Developmental Disabilities and Addiction Services. Moreover, both Richins and McQueen testified that the Respondent was in-

[10] Although the letter is undated, the envelope attached is postmarked August 28.

formed of this determination in August, before Agulue terminated Torley for her lack of progress on the IFI program.

B. Analysis and Conclusion

1. Employee status of Torley

In determining whether an individual is an employee or an independent contractor under Section 2(3) of the Act, the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity. *Argix Direct, Inc*., 343 NLRB 1017, 1020 (2004); *BKN, Inc*., 333 NLRB 143, 144 (2001); *Roadway Package System*, 326 NLRB 842 (1998). The multifactor analysis set forth in Restatement (second) of Agency, Section 220 includes the following factors to be examined:

> (1) The control that the employing entity exercises over the details of the work;
> (2) Whether the individual is engaged in a distinct occupation or work;
> (3) The kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision;
> (4) The skill required in the particular occupation;
> (5) Whether the employer or the individual supplies the instrumentalities, tools, and place of work for the person doing the work;
> (6) The length of time the individual is employed;
> (7) The method of payment, whether by the time or by the job;
> (8) Whether the work in question is part of the employer's regular business;
> (9) Whether the parties believe they are creating an employment relationship; and
> (10) Whether the principal is in the business.

The Board has said that no one factor is controlling in making this determination. This is a highly fact specific inquiry and each factual situation must be analyzed to determine whether the evidence predominates in favor of employee or independent contractor. The same set of factors that is decisive in one case may not be so persuasive when balanced against a different set of opposing factors. The weight attached to each factor may shift from one case to another. See Roadway Package System, Inc., 326 Supra at 850. Finally, the Board, with court approval, has held that the party asserting independent contractor status has the burden of proof. *BKN, Inc.,* 333 NLRB, supra at 144. See also *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 710–712 (2001).

In the case at hand, the Respondent focused a great deal on the nature of Torley's initial employment by GCCS, which is not a party to this proceeding. Regardless of the employee vs. independent contractor status of Torley during the time she worked for GCCS, she was no longer employed by that entity when Agulue terminated her on September 8. At that time, she was working full-time for the Respondent, was paid on an hourly basis with no deductions, had to account for her time by, first, signing in and signing out, and then by punching a time card. Although she received no health insurance benefits, neither did the Respondent's other employees. There is no dispute that she worked in an office provided by the Respondent, and that the Respondent also provided the "instrumentalities and tools" for doing the work. Although it is also true that Torley worked independently, with little or no supervision, this is more the product of the professional nature of the work than anything else. Torley worked exclusively for the Respondent and was accountable to the Respondent for her work. As previously noted, she bore no entrepreneurial risk in performing the work for the Respondent. Had the Respondent paid her on a different basis, say a percentage of any grants she succeeded in getting for the Respondent, or payment contingent on meeting some benchmark, rather than strictly for the hours she worked, then a case could be made that she was an independent contractor.[11] Weighing all of the evidence in the record, and noting the dearth of evidence suggesting true independence, I conclude that the Respondent has not met its burden of establishing that Torley was not its employee when she was terminated on September 8.

2. Torley's termination

The complaint alleges that the Respondent terminated Torley because it believed she had engaged in protected concerted activities with other employees, and to discourage its employees from engaging in such activities. The Respondent denies that it terminated Torley for this reason, denying any knowledge that employees had engaged in protected concerted activity, and asserting that Torley was in fact terminated for failing to perform the services for which she was hired. This case thus turns on employer motivation and the test adopted by the Board in Wright Line applies.[12] Under this analysis, the General Counsel must first show, by a preponderance of the evidence, that protected concerted activity was a motivating factor in the employer's decision to terminate an employee. If the General Counsel meets his burden, then the Respondent must come forward with evidence sufficient to show that it would have taken the same action even in the absence of protected activity. Id. Accord: *United Rentals, Inc*., 350 NLRB 951 (2007); *North Carolina License Plate Agency #18,* 346 NLRB 293 (2006); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

To establish that Torley was engaged in protected concerted activity, General Counsel offered Torley's testimony regarding what occurred at meetings with other employees in July and August. While uncorroborated, I found Torley's testimony generally credible. I note that Agulue acknowledged being aware that employees had concerns about their working conditions and benefits because Davis, the Program Manager to whom Torley reported during that period, occasionally brought these concerns to his attention. In fact, Agulue was in the process of obtaining health insurance for the employees around that time, lending some credibility to Torley's testimony that this was an issue discussed among the employees. Moreover, Ag-

[11] I note, for example, that the Respondent paid Dr. Jackson a fee based on the number of behavior plans she completed, without regard to the time it took her to complete the plans.

[12] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Approved in *NLRB v. Transportation Mgmt. Corp.,* 462 U.S. 393, 395 (1983).

ulue proposed a change in the work schedule at the September 8 staff meeting because some employees had asked for a longer lunch break. Torley's testimony regarding her meeting with Agulue on September 3, in which she "invoked whistleblower status" and told him the employees were a "collective bargaining unit", stands uncontradicted. Agulue's animus toward Torley is evident in his response at the September 8 meeting, when she raised child care concerns of other employees in response to his proposal to change the work schedule. Agulue told her not to speak if this was not her concern. There is also the uncontradicted testimony of Torley that Mrs. Agulue, an admitted supervisor and agent of the Respondent, asked Torley, on September 3, why she was "trying to create trouble in the agency." Even more significant is Agulue's testimony regarding the September 8 meeting, when he terminated Torley. Agulue claimed that he did not go to Torley's office with the intention of terminating her but decided to do so after she attempted to bring in another employee as a witness, thus "causing a commotion." I find that this evidence, particularly in light of the timing of the decision soon after the September 8 staff meeting, is sufficient to establish that Agulue at least believed that Torley was involved in protected concerted activity and that this was a motivating factor in his decision to terminate her.

I find further that the Respondent has not met its burden of showing that it would have terminated Torley on September 8 regardless of the existence of any protected concerted activity. Despite Agulue's efforts to paint Torley as unqualified to be a behavior specialist and incompetent as to the work she did for the Respondent, he ultimately claimed that this had nothing to do with his decision to terminate her. Accepting his testimony that he terminated Torley solely because she failed to deliver what she promised when hired to obtain funding for GCCS, it is clear that this reason was a pretext. The testimony of Richins and McQueen, the State employees who had no stake in the outcome of this proceeding, establishes that the lack of action on GCCS' applications was not Torley's fault. Rather, it was the deficiencies in the Respondent's existing programs, uncovered during the State's audit, which led the State to suspend processing any applications from Agulue's agencies. Moreover, these witnesses confirmed that Agulue was aware of this before he terminated Torley. As to the letter from the federal government, rejecting a grant application as untimely, I credit Torley's testimony that Agulue had already discussed this with her before September 8, and not at the meeting when he terminated her. Moreover, the grant at issue was not part of the IFI program for which GCCS was created and would not have been a significant factor in starting up the business. Agulue's reliance on this as a basis to terminate Torley is further evidence of the pretextual nature of the discharge. The Board has held that, where an employer's asserted reason for termination is found to be a pretext, by definition, the employer has failed to meet its burden under *Wright Line*, supra. *Metropolitan Transportation Services*, 351 NLRB 657, 660 (2007); *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Accordingly, based on the above and the record as a whole, I find that the Respondent terminated Victoria Torley in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

CONCLUSION OF LAW

By discharging its employee, Victoria Torley, on September 8, 2008, because the Respondent believed she was engaged in protected concerted activities and to discourage other employees from engaging in such activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having unlawfully discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to post an appropriate notice to its employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, CSS Healthcare Services, Inc., Jonesboro, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in concerted activities with other employees that are protected under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Victoria Torley full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Victoria Torley whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such addi-

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Jonesboro, Georgia, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 29, 2009.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you for engaging in concerted activities with other employees that are protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Victoria Torley full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Torley whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Torley's unlawful discharge, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CSS HEALTHCARE SERVICES INC.